

NOTICE

Memorandum decisions of this Court do not create legal precedent. See Alaska Appellate Rule 214(d) and Paragraph 7 of the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3). Accordingly, this memorandum decision may not be cited as binding authority for any proposition of law.

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

DAWSON J. SULT,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-12305
Trial Court No. 3PA-14-786 CR

MEMORANDUM OPINION

No. 6715 — October 3, 2018

Appeal from the Superior Court, Third Judicial District, Palmer,
Kari Kristiansen, Judge.

Appearances: Maureen E. Dey, Gazewood & Weiner, P.C.,
Fairbanks, under contract with the Office of Public Advocacy,
Anchorage, for the Appellant. Brittany L. Dunlop, Assistant
District Attorney, Palmer, and Jahna Lindemuth, Attorney
General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, and Allard and Wollenberg,
Judges.

Judge WOLLENBERG.

The State charged Dawson J. Sult, as principal or accomplice, with nine property crimes that occurred during a two-month period in 2014 in the Big Lake and Flat Lake areas — one count of first-degree burglary, one count of second-degree burglary, one count of first-degree vehicle theft, three counts of second-degree theft, two

counts of third-degree theft, and one count of fourth-degree criminal mischief. Many of these offenses involved the theft of fuel. The jury found Sult guilty of all the charged offenses. (The court later merged two of the counts of second-degree theft.) On appeal, Sult argues that the State presented insufficient evidence to support his convictions.

When a defendant challenges the sufficiency of the evidence to support a criminal conviction, an appellate court is required to view the evidence, and all reasonable inferences based on that evidence, in the light most favorable to upholding the jury's verdict.¹ Viewing the evidence in this light, we then ask whether a reasonable juror could find that the State had proved the defendant's guilt beyond a reasonable doubt.²

Sult argues that the evidence was insufficient because there was no direct evidence linking him to the crimes: no witnesses observed Sult stealing property or breaking into homes or in personal possession of stolen property, and the State did not introduce any DNA or fingerprint evidence tying Sult to the charged offenses. But while confirming the presence of Sult's DNA or fingerprints would certainly have linked him more directly to the offenses, the absence of such evidence does not mean that the State's evidence was insufficient. When we review the sufficiency of the evidence to support a conviction, "[n]o different standard applies when the state's evidence is circumstantial rather than direct."³

¹ See *Johnson v. State*, 188 P.3d 700, 702 (Alaska App. 2008).

² *Id.*

³ *Stumbaugh v. State*, 599 P.2d 166, 173 (Alaska 1979) (citing *Des Jardins v. State*, 551 P.2d 181, 184 (Alaska 1976)). Sult relies on a formulation of the sufficiency test set forth in *Davis v. State*, 369 P.2d 879, 882 (Alaska 1962). But the Alaska Supreme Court later abandoned this test. See *Jordan v. State*, 481 P.2d 383, 387 (Alaska 1971) (citing *Martinez v. State*, 423 P.2d 700 (Alaska 1967)).

Here, Sult concedes (as his attorney did in the trial court) that there was evidence connecting a Ford Explorer to several of the crime scenes and to a Forestry Service cabin where some of the stolen belongings were recovered. This Explorer was distinctive because it had four different types of tires, and these mismatched tires were consistent with the tread patterns identified at the crime scenes. The evidence tying Sult to this vehicle was strong; troopers regularly saw Sult driving the vehicle. In addition, Sult acknowledged in a phone call with his mother after his arrest that he had been at the cabin where some of the property was recovered (or at least, that the truck he had been driving was by the gate).

Given the evidence presented at trial and Sult's concessions on appeal, and viewing the evidence in the light most favorable to the jury's verdicts, we reject Sult's challenges to the sufficiency of the evidence to support his convictions.

Sult also argues that his composite sentence is excessive. At the time of sentencing, Sult was twenty-nine years old. He was facing sentencing for six separate incidents involving four different victims.

Sult had one prior felony conviction for first-degree failure to stop at the direction of a peace officer and three misdemeanor convictions, one for fourth-degree criminal mischief and two for driving under the influence. In addition, Sult had served all of the suspended time on his prior felony conviction because of probation violations.

As a second felony offender, Sult faced a presumptive sentencing range of 4 to 7 years on his single class B felony conviction (first-degree burglary) and a range of 2 to 4 years on each of his class C felony convictions (one count of second-degree burglary, two counts of second-degree theft, and one count of first-degree vehicle theft). He also faced a maximum sentence of 1 year on each of the three misdemeanor convictions (two counts of third-degree theft and one count of fourth-degree criminal mischief). The trial court imposed a composite term of 10 years to serve.

Sult raises two claims. First, Sult argues that the trial court’s imposition of a sentence with no suspended time and no probation failed to adequately account for his rehabilitative potential. In response, the State contends that, given Sult’s discretionary parole eligibility as well as the availability of good-time credit and mandatory parole, Sult’s “arguments about the failure of the court to consider rehabilitation are fairly moot.” But the State miscalculates Sult’s discretionary parole eligibility under the version of the discretionary parole statute that governs Sult’s case.⁴ And it would be inappropriate for this Court to affirm an otherwise excessive sentence based on the possibility that Sult might be released early.⁵

That said, the record shows that the trial court considered Sult’s rehabilitative potential and concluded, based on Sult’s history, that Sult “doesn’t do well on probation.” This finding is not clearly erroneous. We note that, in a letter update prepared by Sult’s probation officer in connection with Sult’s probation violations on his first felony conviction, the probation officer stated that Sult “had difficulty complying with the conditions of probation from the beginning of his supervision period.” And, as noted earlier, Sult ultimately served all of his suspended time because of probation violations.

Second, Sult argues that the trial court improperly relied on Sult’s assertion of his privilege against self-incrimination at sentencing to conclude that his prospects for rehabilitation were low. The trial court noted that Sult did not make a statement to the court, and as a result, the court declared that it did not have a good sense of whether he

⁴ See AS 33.16.090(b) (pre-2017 version).

⁵ Cf. *Jackson v. State*, 616 P.2d 23, 25 (Alaska 1980) (concluding that a trial court must impose a sentence based on the assumption that the defendant will serve the entire term).

would be particularly amenable to rehabilitation or whether he could benefit from rehabilitative services through probation.

We do not interpret the court as relying on Sult's assertion of privilege to conclude that his rehabilitative potential was low. Rather, the court stated that, in the absence of any additional information, it could only rely on Sult's past conduct to determine his future prospects.

As we said in *Hamilton v. State*:

Although it is improper for a sentencing judge to penalize a defendant for remaining silent, a sentencing judge remains obliged . . . to assess the seriousness of the defendant's crime, the prospects for the defendant's rehabilitation, and the extent to which imprisonment may be needed to deter the defendant from future acts of lawlessness and/or to protect the public until the defendant is rehabilitated. When a defendant declines to offer evidence on these issues, the sentencing judge must base his or her decision on the existing record.^[6]

As in *Hamilton*, the trial court in this case acknowledged that Sult had a Fifth Amendment right to remain silent during the sentencing proceedings. But in the absence of additional evidence, the court could only sentence Sult based on the record before it. Given that record — namely, Sult's past conduct — the court declined to impose probation.

We will reverse a sentence only if the sentence is clearly mistaken.⁷ After independently reviewing the record, we conclude that the sentence imposed here is not clearly mistaken.

Accordingly, we AFFIRM the judgment of the superior court.

⁶ *Hamilton v. State*, 59 P.3d 760, 772 (Alaska App. 2002) (footnotes omitted).

⁷ *State v. Hodari*, 996 P.2d 1230, 1232 (Alaska 2000).